U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 March 2007

Case No.: 2004-LHC-2492

OWCP No.: 08-121944

IN THE MATTER OF

S. C.,
Claimant

vs.

MAD, LTD.,
Employer

and

ACE AMERICAN INSURANCE CO.,
Carrier

APPEARANCES:

QUENTIN D. PRICE, ESQ.,
On Behalf of the Claimant

CHARLES G. CLAYTON, IV, ESQ.,
On Behalf of the Employer

BEFORE: PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER

PROCEDURAL STATUS

This case arises from a claim for benefits under the Longshore Harbor Workers' Compensation Act (the Act),[1] brought by S.C. (Claimant) against Mad Ltd. (Employer) and ACE American Insurance Co. (Carrier).[2]

[1] 33 U.S.C. §901 *et seq.*

The matter was referred to the Office of Administrative Law Judges for a formal hearing. Both parties were represented by counsel. On 16 May 06, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following:[3]

Witness Testimony of
Claimant

Exhibits[4]
Joint Exhibit (JX) 1
Claimant's Exhibits (CX) 1-8, 10-26[5]
Employer's Exhibits (EX) 1-17[6]

My findings and conclusions are based upon the stipulations of counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

STIPULATIONS[7]

1. Claimant was involved in an accident on 12 Oct 02.

2. The accident occurred in the course and scope of his employment as a longshoreman as defined under the Act.

3. There was an Employee/Employer relationship at the time of the accident.

4. There was proper and timely notice of the injury to Employer.

5. Claimant reached maximum medical improvement (MMI) on 1 Sep 04.

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[2] Employer and Carrier are collectively referred to as Employer herein.
[3] I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.
[4] Counsel were informed that since they had submitted what appeared to be voluminous en globo exhibits in EX-2, EX-10, EX-11, CX-14 and CX-17, only those pages specifically cited by Counsel on brief or at hearing would be considered part of the record upon which the Court would base its decision. In addition, EX-15, Claimant's deposition, was offered only for its impeachment value and consideration was limited to only those pages cited as such.
[5] Mexican medical reports were originally marked as CX-26, but were withdrawn before admission.
[6] Except those parts of EX-13 and EX-14 that purport to describe what is already on the videotape.
[7] JX-1; Tr. 24-29.

6. At the time of his injury, Claimant's had an average weekly wage (AWW) of $837.75.

7. All medical benefits required under the Act have been provided.

FACTUAL BACKGROUND

Claimant worked for Employer as a welder in October 2002, when he fell through a hole and injured his back. He underwent surgery in December 2002 and has not returned to work since.

ISSUES[8]

Claimant argues that he has been unable to return to his original job at any time following his accident on 12 Oct 02 and that since Employer has not demonstrated any suitable alternative employment (SAE), he was temporarily totally disabled from 13 Oct 02 until 1 Sep 04, at which point he reached MMI and became permanently totally disabled. Claimant also seeks penalties.

Employer responds that Claimant could have returned to some type of work as of 10 Jan 03 and could have returned to his original job when he reached MMI on 1 Sep 04. It also argues that it established SAE as soon as Claimant was able to work in some capacity.

LAW

Although the Act must be construed liberally in favor of the claimant,[9] the "true-doubt" rule, which resolves factual doubts in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act,[10] which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion.[11]

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[8] There was some evidence in the record discussing the source of Claimant's back and leg pain. Both at trial and on brief, Employer argued that Claimant has fully recovered from any injuries and is able to work. It did not argue that Claimant's alleged disability was related to something other that his fall through the hole. Implicit in this ruling and order is a finding that Claimant's back condition and back and leg pain are consequences of his fall on 12 Oct 02. Although there is some mention of medical benefits relating to care by a chiropractor, there is no evidence of subluxation treatment and Claimant does not list the matter as a disputed issue in his brief.

[9] *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *Britton*, 377 F.2d 144 (D.C. Cir. 1967).

[10] 5 U.S.C. § 556(d).

[11] *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct 2251 (1994), *aff'g* 900 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners.[12]

Nature and Extent of Disability

Once it is determined that he suffered a compensable injury, the burden of proving the nature and extent of his disability rests with the claimant.[13] Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or permanent). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment."[14] Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown.[15] Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage-earning capacity.

The question of extent of disability is an economic as well as a medical concept.[16] To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury.[17]

A claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability.[18] Once a claimant is capable of performing his usual employment, he suffers no loss of wage-earning capacity and is no longer disabled under the Act.

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[12] *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98, 101 (1997); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Bank v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, *reh'g denied*, 391 U.S. 929 (1968).

[13] *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980).

[14] 33 U.S.C. § 902(10).

[15] *Sproull*, 25 BRBS at 110.

[16] *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).

[17] *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994).

[18] *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988).

To establish a *prima facie* case of total disability, the employee need only show he cannot return to his regular or usual employment due to his work-related injury.[19] If the claimant makes this *prima facie* showing, the burden shifts to employer to show suitable alternative employment.[20] The presumption of disability ends on the earliest date that the employer establishes suitable alternate employment.[21]

Suitable Alternative Employment

If the claimant is successful in establishing a *prima facie* case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment.[22] Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> 1. Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> 2. Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?[23]

Employers need not find specific jobs for a claimant; instead, they may simply demonstrate "the availability of general job openings in certain fields in the surrounding community."[24] Employers may meet their burden by first introducing evidence of suitable alternative employment at the hearing,[25] even though such evidence may be suspect and found to be not credible.[26]

The employer must establish the precise nature and terms of job opportunities it contends constitute suitable alternative employment in order to establish the claimant is physically and mentally capable of performing the work and that it is realistically available.[27] The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the

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[19] *Elliot v. C & P Tel. Co.*, 16 BRBS 89 (1984).
[20] *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988); *Nguyen v. Ebbtide Fabricators*, 19 BRBS 142 (1986).
[21] *Palombo v. Director, OWCP*, 937 F.2d 70, 25 (2d Cir. 1991).
[22] *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981).
[23] *Id*. at 1042.
[24] *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039 (5th Cir. 1992).
[25] *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 236-37 n.7 (1985).
[26] *Diamond M Drilling Co.*, 577 F.2d at 1007 n.5.
[27] *Piunti v. ITO Corporation of Baltimore*, 23 BRBS 367, 370 (1990); *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94, 97 (1988).

medical opinions of record.[28] A showing of only one job opportunity may suffice under appropriate circumstances.[29] Conversely, a showing of one unskilled job may not satisfy the employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful.[30] Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work."[31]

Penalties

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

To controvert the right to compensation, the employer must file a notice on or before the 14th day after it has knowledge of the alleged injury or death or is given notice.[32] The employer must file on or within the 14th day after it has knowledge of the injury, not knowledge of the claim.[33] Where the employer fails to file a notice of controversion, its liability under 14(e) terminates when the Department of Labor "knew of the facts that a proper notice would have revealed."[34] Therefore, where an employer fails to file a timely notice of controversion it has 28 days from the date of knowledge within which to pay compensation without incurring liability under 14(e).

The essential elements of the notice include a statement that the right to compensation is controverted, the names of the claimant and employer, the date of the alleged injury, and the grounds for controversion.[35]

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[28] *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985); s*ee generally, Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992); *Fox v. West State, Inc.*, 31 BRBS 118 (1997).
[29] *P & M Crane Co.*, 930 F.2d at 430.
[30] *Turner*, 661 F.2d at 1042-1043; *P & M Crane Co.*, 930 F.2d at 430.
[31] *Turner*, 661 F.2d at 1038, *quoting Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003 (5th Cir. 1978).
[32] *See Spencer v. Baker Agric. Co.*, 16 BRBS 205, 209 (1984).
[33] *See Jaros v. National Steel Shipbuilding Co.*, 21 BRBS 26, 32 (1988); *Spencer*, 16 BRBS at 209; *Wall v. Huey Wall, Inc.*, 16 BRBS 340,343 (1984); *Miller v. Prolerized New England Co.*, 14 BRBS 811, 821 (1981); *Davonport v. Apex Decorating Co.*, 13 BRBS 1029, 1041 (1981); *Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 142 (1985).
[34] *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1295 (9th Cir. 1979); *Hearndon v. Ingalls Shipbuilding Inc.*, 26 BRBS 17, 20 (1992) (DOL knew of facts that proper notice would have revealed when case was referred to OALJ for formal hearing).
[35] See 33 U.S.C. § 914(d).

An informal conference may satisfy the requirement to notify the Department of Labor and extinguish liability for Section 14(e) penalties. Liability ceases on the earlier date of the filing of the notice of controversion or informal conference.[36]

The title of the document is not determinative and if a document contains all of the required information, it may be considered equivalent to a notice of controversion.[37] A notice of suspension of payments may also qualify.[38]

EVIDENCE

Claimant testified at trial in pertinent part that: [39]

> He was born in 1945 and attended about one year of school in Mexico. The one year was intermittent and spread out over three calendar years. He signed an employment application for Employer that someone helped him fill out.[40] It is not correct because it says he has four years of high school. He does not recall telling Employer's counsel that he attended school for four years in Mexico, but might have done so because he was embarrassed.
>
> He can read and write Spanish, but speaks very little English. He was born and raised in Eflechero, Mexico. He came to the United States about 42 years ago and has lived in Port Arthur, Texas for the past 36 years.
>
> When he first got to Texas, he worked on a dredge barge for four or five years. He then went to Port Arthur and has worked in shipyards and offshore ever since. He started tacking as an apprentice and got some training as a welder. He basically learned how to be a welder through on-the-job training. He worked as a welder for about 20 years before his injury. He worked for Employer and other companies like R & R Maintenance Company, depending on who had available work. His work with Employer was seasonal, with less available in the winter. Over a typical year, he worked for Employer for three to six months.

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[36] *National Steel & Shipbuilding Co. v. U.S. Dep't of Labor*, 606 F.2d 875 (9th Cir. 1979), *aff'g in part and rev'g in part Holston v. National Steel & Shipbuilding Co.*, 5 BRBS 794 (1977).
[37] *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245, 249 (1991), *aff'd on recon. en banc*, 25 BRBS 346 (1992).
[38] *White v. Rock Creek Ginger Ale Co.*, 17 BRBS 75, 79 (1984), *White v. Rock Creek Ginger Ale Co.*, 17 BRBS 75, 79 (1984), *rev'g Garner v. Olin Corp.*, 11 BRBS 502 (1979), 11 BRBS 502 (1979).
[39] Tr. 33-110 (although there are a number of inconsistent statements herein, they are an accurate reflection of Claimant's testimony).
[40] EX-12, p. 9.

As a welder, he carried anywhere from 80 to 100 pounds whenever he had to move from one job to another. He carried a torch, a hammer, a whip, gloves, rulers, and anything else he needed. He had to move all of the equipment sometimes two or three times in one week and sometimes two or three times in one month, depending on the job. As a welder, he could not work sitting down. He has to put his body in different positions when he welds. Sometimes he welded upside down, inclined, or on his back. Some welding jobs require that he bend for two or three hours.

It was not possible to carry the equipment in some other type of conveyance, like a wheelbarrow, because he had to go up and down stairs. Fitters cannot help carry welder's equipment from place to place because they have their own things to carry. Sometimes a welder's helper could help carry the welder's equipment.

On 12 Oct 02, he was on the second floor of an offshore oilrig platform near Galveston and fell about five or six feet through a hole. He turned his body and scratched his arm. He started having back pain about 15 minutes later. He reported the injury to his foreman, who sent him to UTMB in Galveston.

The staff at UTMB took x-rays, gave him medicine, and told him to go home and if needed, to see a doctor. He left Galveston and went back to Port Arthur.

He went to see the company doctor in Nederland. The doctor checked Claimant twice and sent him to therapy for one day. He had back pain down both legs, with the right one worse than the left. He went to see Dr. Craig at Tower Medical, who sent Claimant for an MRI and then referred him to Dr. Angel, with Golden Triangle Neurocare.

He does not know who filled out pages 38 through 42 of CX-14. The doctor put the X marks on page 40. They accurately show where Claimant had pain.

The pain goes from his big toe all the way up into his neck. He also told his doctors that the nerve hurts all the way from his toe up to his neck. He does not know why his medical records would not reflect that.

He gets cramps in the low center of his back, a little below the belt. He has occasional left leg pain, sometimes three times a week, sometimes more, and sometime less. The pain in his right leg is almost continuous. It does not go away entirely, but just kind of falls asleep. If it is cold outside it hurts even more. His back hurts more when he is sitting or lying down. It hurts him less when he can walk a little bit.

Dr. Angel performed surgery on Claimant's low back in December 2002. At first, it helped the pain in his low back and right leg. Before the surgery, it was so bad he could not walk and was losing all the strength in his legs. The pain was so bad that he did not feel good, but he was never to the point that he could not walk.

After the surgery, he was able to walk. The surgery helped his left leg as well. After the surgery, Dr. Angel prescribed physical therapy. The physical therapy did not get rid of the pain. The doctor wanted Claimant to do some strong physical therapy and Claimant told him that he could not do that because he was in pain. Dr. Angel told Claimant to walk and try to do as much as he could. He did not put any specific limits on Claimant's activities. Claimant tried to walk as much as he could in April - May 2003.

Claimant also underwent a functional capacity evaluation (FCE) at TIRR Physical Therapy Clinic. He tried as hard as he could to do everything that the physical therapist asked, but he was in significant pain. In September 2003, Dr. Angel referred him to Dr. David Jones.

Dr. Babus, an associate of Dr. Jones', gave Claimant three injections in his low back. The first one worked very well and lasted three weeks. The second one worked a little less and lasted two weeks. The third one only helped for about one week. In January/February 2004, Dr. Jones ordered an MRI of his low back since it was hurting. After the MRI, Dr. Jones sent Claimant to physical therapy, but the insurance adjuster did not approve it.

Between January and September 2004, Dr. Jones told Claimant he might need another surgery once a bone doctor evaluated him. Claimant had a CAT scan done. He then returned to Dr. Angel who ordered an EMG. Dr. Angel told Claimant that the pain was never going to abate and discussed the possibility of surgery. He said that he was going to send Claimant to the therapist to evaluate whether Claimant needs surgery. Dr. Angel said that he thought Claimant would eventually need surgery.

Dr. Angel referred Claimant to Dr. Laurents, a chiropractor, but the insurance company never approved the treatment. The only medical care he has had since late 2004 is pain medications from Dr. Jones and he is not currently seeing any other doctors.

In the middle of 2005, Claimant went to a doctor in Mexico and got pain medications. Claimant was in Mexico to see his ailing father.

Right now, he can only sit or lie down for an hour before he starts feeling pain in his lower back and has to stand up. He can last longer standing up and can walk up to two hours. He has pain all the way down his right leg. It gets worse if he sits down for a long period of time. Changing from sitting to standing or standing to sitting makes his back feel a lot better. He also has pain when he bends forward.

He can drive, but has to stop every 45 to 75 minutes.

He tries to help his wife with whatever he can. He takes the kids to school and brings them home. He might do yardwork, i.e. cut the grass and plant some peppers and tomatoes. He can use a walk behind lawnmower, but sometimes it takes him a day or two to finish. He does not recall saying at his deposition that he could only cut it for about 15-20 minutes at a time or that he had stopped cutting the grass because it caused pain and he could not do it anymore. Nevertheless, he now states that he has stopped doing it as often. Sometimes his wife or kids cut the grass, but he has not stopped doing it altogether.

He does not do any volunteer work. He has helped Catholic Charities and Father Blanco by doing some handyman work. He occasionally helps clean up the tables or takes the trash out when everyone leaves church.

Claimant can carry about 15 to 30 pounds at most. He cannot lift more than 40 pounds. He might be able to lift things like a toolbox or heavy sheets of plywood depending on how big and heavy they are. He could mange 60 pounds just to pick up and move. He can only lift 10 to 15 pounds pain free.

He is not a professional home improver (i.e. fixing floors or putting molding in), but he does do whatever he can to help. He does some painting around the house. He also uses a shovel, but it hurts if he puts a little strength into it. He recalls going to a lumberyard and obtaining some wood, but did not recall then working on a house.

He does not recall the name of the pain medication he currently takes. He only takes it when it hurts the most because it upsets his stomach and makes him constipated. He took over-the-counter medications like Tylenol and Advil for a while and they helped a little. The pain makes him get out of bed, walk around for a few minutes, and then go back to bed. It wakes him up three to four times a night. The last time he took pain medication was last night. He normally takes pain medication in the afternoon or in the evening. Sometimes he takes one at night and one in the morning. In a typical month there will be twenty days on which he takes pain medication.

He cannot go back to welding because of his back. He cannot stand for a long time, bend, or carry the weight.

He has not worked since his accident, but has tried to find work. He looked for jobs at restaurants. He went to the Tequila Restaurant, the Cameron Restaurant, and Magana's. He did not get a job at any of those restaurants because they needed someone to carry things and take out the trash, which he could not do. He has not looked for a job anywhere else. He did not apply for a job at the Guadalajara Restaurant because the job was already taken. The Guadalajara Restaurant is not even open now.

He is not aware of anyone from the Department of Labor trying to find him a job doing fire watch. He recalls meeting with a lady from the Department of Labor in August 2003. He did not remember her saying anything about accommodations Employer would make for him to return to work. He recalled that she mentioned going to school. He met her twice. On the second visit, she told him that because of his advanced age and little training it was not going to be easy to find him a job and that she would call. She never called back.

He remembered speaking with a lady who interviewed him and then tried to find him jobs. She never gave him any job leads or numbers to call for possible jobs. She did not assist him in any way to find jobs. He recalled getting a list of some jobs. He applied for the seafood picker position at J.B.'s Packing Company, but did not get the job. He does not know why. He did not apply for jobs at Helena Laboratories or Munro's Dry Cleaners. He filled out applications, but does not have copies of them.

Since his accident, he never discussed returning to work with Employer and Employer never called him to say it had a job for him. He recalled making a prior sworn statement to Employer's counsel that after his injury Employer offered him an opportunity to work answering phones. However, he then testified that he did not remember if they offered him a job.

He has never filed a lawsuit or a workers' compensation claim other than this one.

He has seen the surveillance video. It showed him stretching out his right leg, which is the leg that gives him more pain. Walking and stretching helps the pain. He can walk for 45 minute to an hour. Then he has to rest. He cannot run or jog much. It also showed him shoveling and weeding his yard. That caused pain in his lower back and an hour later he had to rest. The tape showed him retrieving a metal toolbox that weighs 30 to 40 pounds out of his truck. He felt some pain from that later. All he does on his car is check the oil or change the water. He has

no special skills as a mechanic. The tape showed him cutting the grass with a lawnmower that weighs 20 to 30 pounds just pushing it. He has a newer one now. After he cuts the grass, his back hurts and he has to lie down and take medicine. The tape showed him straining. He did not recall why the grass was so tall.

He thinks he was convicted of DWI three times. He did not recall having five arrests for DWIs from 1979 through 1996 or being convicted of a felony for a third or fourth DWI. He has been convicted of a felony with respect to these DWI arrests and had to attend alcohol treatment. However, he only spent six or seven hours in jail on any one of the arrests.

He does not know if there are any jobs that he would be interested in trying to pursue, but he is not adverse to trying to go back to work in some capacity or doing some type of retraining.

Claimant testified at deposition in pertinent part that: [41]

About eight months after his accident, Employer called Claimant and asked him if he wanted to come back to work in a job where he could remain seated and answer the phone.

He can help cut the grass with a self propelled walking mower, but only for 10 or 15 minutes at a time. It can take him one or two days to do it. He has stopped cutting the grass.

Employer's Accident Report shows in pertinent part that: [42]

Claimant was injured on 12 Oct 02 when he stepped in an open hole. He suffered minor abrasions and complained of back pain. He was taken to the emergency room and then home. From 13 through 15 Oct 02, Claimant reported improvement. He had another doctor's appointment on 16 Oct 02, was scheduled for an MRI, and released for limited duty.

Employer's personnel records show in pertinent part that: [43]

His job application states he attended four years of high school in Mexico.

[41] EX-15 (Claimant's deposition was offered only for its impeachment value and only those pages cited to as impeachment were considered. In its brief, Employer cites the deposition as EX-12, but it is actually EX-15).
[42] CX-10; EX-12.
[43] EX-13.

University of Texas Medical Branch records show in pertinent part that:[44]

> Claimant was treated at the emergency room on 12 Oct 02 after a fall, for hip and back pain. X-rays of the hip and back revealed no acute fractures, but did show spondylosis at L4-S1, with osteoarthritis in the lower lumbar and sacroiliac joints. He was released to return to work on 14 Oct 02, with a 10 pound lifting restriction in place for one week.

Tower Medical Center records show in pertinent part that :[45]

> On 16 Oct 02, Claimant complained of back pain extending into his legs after having stepped in a hole and twisting his back. His previous x-rays were reviewed and determined to show mild disc space narrowing at L4 and transitional L5 vertebra with bilateral anomalous joints, but no fracture or subluxation. He was limited to light duty and new x-rays and an MRI were recommended.
>
> On 23 Oct 02, he returned with the same complaints. On 28 Oct 02, he had an MRI, which showed transitional vertebra at lumbosacral junction with partly scaralized L5 and right paracentral focal disc protrusion of L4-L5 causing mass effect on thecal sac and impinging on right L5 nerve root and mild central canal narrowing at L3-L4 and L4-L5.
>
> On 29 Oct 02 and 5 Nov 02, he returned with the same complaints and was referred to Dr. Angel.
>
> On 18 Aug 03, Claimant returned for a work evaluation. Claimant reported that he had been offered a job with no pulling, lifting, or climbing. Claimant would not have to do anything but sit and weld in 8 hour shifts and would be provided with helpers. Dr. Craig recommended Claimant have epidural blocks before returning to work. The blocks might enable Claimant to return to full duty, and if they did not, he could still be deemed at MMI with a final determination made as to his work capacity.

Christus St. Elizabeth Hospital records show in pertinent part that :[46]

> On 12 Dec 02, Claimant had a discectomy of L5-5 and the tissue was consistent with degenerative features.

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[44] CX-11.
[45] CX-12; EX-4.
[46] CX-13.

RS Medical Prescription records show in pertinent part that:[47]

> In January 2003, Claimant was provided a muscle stimulator, which over the next few months improved his range of motion and decreased his leg pain and spasms.

Employer's answers to interrogatories show in pertinent part that:[48]

> Employer paid Claimant $528.50 in weekly disability compensation until 4 Jul 04, when his compensation decreased to $362.38 weekly.

Claimant's answers to interrogatories show in pertinent part that:[49]

> He dropped out of the third grade. He has been incarcerated for DWI three times, in Winnie, Port Arthur and Groves, Texas.

Winter Investigations' report and surveillance video show in pertinent part that:[50]

> On 19 Mar 04, Claimant drove a small pickup truck on a couple of short (5-10 minute) trips. He also worked for about 15 to 30 minutes in the rear passenger section of the truck, bending, twisting, stretching, and reaching to gain access.
>
> On 20 Mar 04, Claimant did yard work for about 80 minutes, including some brief breaks. He pushed a lawn mower through heavy tall grass. He started the mower and a weed eater by pulling a starter cord. He pushed and lifted the handle of the mower to get it through the grass. He squatted to reset the mower wheels. He lifted the mower and kicked it to dislodge grass. He also shook it. He used a weed eater and raked yard cuttings, bending over to pick them up. He also bent over to pick up and carry gas cans. Some of the weeding was done while a younger (late teens or early twenties) male stood by and watched.
>
> On 30 Apr 04, Claimant drove a small pickup truck on a couple of short (5-10 minute) trips. He stretched and walked for about 15 minutes. He also went to a donut shop. He used a shovel to dig some grass out of his yard and then got on his knees to pull grass. He worked for about 10 minutes.

[47] CX-16.
[48] CX-18.
[49] EX-9.
[50] EX-13.

On 5 May 04, Claimant drove a small pick up truck on a couple of short (5-10 minute) trips. He walked for about 40 minutes and bent to touch his toes to stretch. He went to a donut shop and lumbar yard. He sat on a small chair and worked for a few minutes, repairing an exterior window.

Paragon Investigations' report and surveillance video show in pertinent part that :[51]

On 19 Oct 04, Claimant drove a small pickup truck on a couple of short (10-20 minute) trips. He leaned over and picked up some objects out of the truck bed. He climbed up into the back of the truck and then back out. He stood leaning on the side of the truck in various postures. He also swept his gutter for a short period of time.

On 22 Oct 04, Claimant drove a small pickup truck on a couple of short (10-20 minute) trips. He picked up a large cardboard box out of the back of the truck. He went for a brief (approx. 30 minute) walk and did some bending and stretching.

On 17 Aug 05, Claimant drove a small pickup truck on a number of short (5-20 minute) trips. He leaned into the pickup passenger compartment. He went to a community center, donut shop, bank, and lumber yard. He put some items into the back of the truck. He took plywood from the back of the truck and moved it by rolling it along the ground on its side. He bent over to pick items up or put them down.

On 18 Aug 05, Claimant drove a small pickup truck on a number of short (5-20 minute) trips. He went to a convenience store, donut shop, and bank. He bent over to pick an item up off the ground.

Dr. Ian Angel testified by deposition and his records show in pertinent part that:[52]

He is a board certified neurosurgeon. He first saw Claimant on 20 Nov 02, upon referral from Dr. Craig for back and leg pain. Claimant reported a history of a fall and a herniated L4-5 disc. Claimant's intake form indicates paresthesia on the back of the left and right legs. A bulging or herniated disc can cause pain at the disc itself. Claimant brought an MRI with him and Dr. Angel conducted a physical examination. Claimant had decreased sensation at the L5 dermatome, which is the top of the foot near the big toe and was consistent with an L5-5

[51] EX-14.
[52] CX-14 (as cited, see fn.4, *supra*); CX-21; CX-22; EX-3.

herniation. Claimant had back pain and a positive straight leg raise on the right. His subjective reports of pain were consistent with the MRI and his condition was related to his fall at work. Dr. Angel planned to give Claimant medication and discussed the possibility of injections. Claimant indicated he preferred surgery.

On 12 Dec 02, Claimant had an L4-5 microdiscectomy, which revealed a nerve root compression at L4-5. Dr. Angel decompressed that nerve root. Two weeks later, Claimant returned and reported some low back pain extending into his hip. His gait and sensation were normal and his strength was good. He continued taking pain medication, muscle relaxants, and anti-inflammatories. He also prescribed a muscle stimulator.

Claimant returned on 27 Jan 03, complaining of leg pain with extensive walking. His examination was unchanged. Claimant was sent to a 4-6 week physical therapy program. He was encouraged to be as active as possible, with a limitation against lifting any more than 20 pounds.

Claimant returned on 1 Apr 03, after completing physical therapy. He tried to work around the house, but stressing his back caused pain into his right hip and thigh. Dr. Angel ordered an EMG to check for nerve involvement and an FCE. The EMG showed no evidence of radiculopathy and that the nerve was not pinched and was healing fine. Claimant gave a good effort in the FCE, which recommended work hardening to strengthen his back and enable him to return to employment.

On 18 Jun 03, Claimant returned and reported pain with bending, stooping, and lifting. He stated he did not believe he could return to work because of his pain during his work hardening. Claimant had a normal EMG and no deficits or weakness, so it was just the pain stopping him from working. Based on Claimant's subjective complaints, Dr. Angel diagnosed Claimant with chronic lumbar pain and decided to refer Claimant to a pain management specialist, Dr. Jones. Dr. Angel did not release Claimant back to work, but expected that Dr. Jones would review that matter.After almost one year, on 17 Mar 04, Dr. Jones sent Claimant back to Dr. Angel. Although Claimant had a number of pain injections, he now complained of back pain toward his left shin. Dr. Jones felt that a subsequent MRI indicated another possible problem. Claimant complained of right leg pain, but Dr. Angel believed it was possible that the left leg problems could have been related to the original accident or a consequence of the previous surgery, even though Claimant had some degenerative changes in his spine and there was some stenosis. The previous surgery would not have revealed an L3-4 problem. Dr. Angel reviewed the 26 Jan 04 MRI, which showed post operative changes and a small protrusion at L3-4 to the opposite side. That problem was not on the previous MRI and Dr. Angel believed it was the result of degenerative

changes unrelated to Claimant's work accident. Dr. Angel believed Claimant might need additional surgery, but wanted a lumbar myelogram to evaluate his spine.

On 14 Jun 04, Dr. Angel approved the jobs listed in Nancy Favaloro's 7 Jun 04 letter.

The myelogram was done in August 2004 and showed a mild disc protrusion or bulge toward the left at L3-4. There was no evidence of impingement. Claimant returned on 1 Sep 04, reporting that the pain had gone from the left side to his right and he was feeling a little better. Although he still had spasms, his exam revealed improvement. Since the pain had improved, Dr. Angel did not recommend surgery and released Claimant to Dr. Laurents, a chiropractor, for an FCE and possible manipulation. Claimant did not have a subluxation. Claimant continued to see Dr. Jones for pain management. At that point, Claimant was stabilized.

On 12 Oct 04, Claimant went to Dr. Laurents. Claimant reported axial pain and difficulty with walking, climbing, and prolonged standing or sitting. He stated his pain was localized in his lumbosacral spine and right buttock. Dr. Laurents believed an FCE was premature.

Essentially, Claimant had consistently complained of right side pain, except for a three month period when he said it moved to his left side. Dr. Angel opined that Claimant only requires treatment with Dr. Jones as needed, but that he should not return to any work while he is under pain management and taking narcotics. However, it might be possible to take Vicodin and still work, depending on the job and when the medication was taken. He defers to the vocational medicine experts as to specific jobs. He has no reason to disagree with any of the FCE reports. But for the pain medications, Claimant could work. Dr. Angel has found no objective evidence for Claimant's subjective complaints of pain.

Dr. David Jones testified by deposition and his records show in pertinent part that:[53]

He is board certified in physical medicine and rehabilitation. He first saw Claimant on 9 Sep 03, upon a referral from Dr. Angel. Claimant reported radicular symptoms and pain in his lower right extremity and lower lumbar region, worsening with activity. Dr. Jones conducted a physical examination and noted decreased sensation to light touch in the lower extremity, which was consistent with a nerve root irritation and disc herniation. Claimant had negative bilateral straight leg raise tests. Scar tissue could have been the source of the nerve root

[53] EX-5; EX-17; CX-15; CX-25.

irritation. Dr. Jones assigned no disability rating, but opined that Claimant could not return to his original job. He diagnosed Claimant with L4-5 herniation with resultant right lumbar radiculopathy post L4-5 microdiscectomy. He prescribed Neurontin and scheduled a lumbar epidural steroid injection.

Claimant had the injection on 26 Sep 03 and returned to Dr. Jones on 6 Oct 03. Claimant reported the injection provided great relief for two days, but the symptoms gradually reappeared. The leg pain was the same as before, but the back pain was not. Dr. Jones decided to do another injection, which was administered on 31 Oct 03.

After missing an appointment on 11 Nov 03, Claimant returned to Dr. Jones on 8 Jan 04, reporting that his right leg paresthesia had not improved and for the past two weeks he had burning pain in his left buttock, which was referring into his left leg and foot. That was the first report of left leg involvement. The symptoms were aggravated by prolonged standing or sitting. The second injection medication spread did not indicate any changes in scarring from the first injection and Claimant reported no new trauma. Dr. Jones found Claimant unable to work based on Claimant's subjective reports that activity caused pain and his job appeared to be physically demanding. He also referred Claimant back to Dr. Angel for another MRI and an evaluation of the new left side symptoms.

Another MRI was done on 26 Jan 04. It showed scarring on the right at L4-5 and scarring on the right around the S1 nerve root, at the L5-S1 level, and a 10 mm paracentral disc herniation at L4-5.

On 2 Feb 04, Claimant returned and reported continued symptoms in both legs. Claimant had a positive straight leg test. Dr. Jones scheduled Claimant for another injection and called Dr. Angel. Dr. Jones believed that if the injection did not provide satisfactory results, Claimant should see Dr. Angel for possible additional surgery.

Claimant had a third injection on 6 Feb 04. The medication spread was unchanged from the earlier injections, indicating Claimant's scar tissue had not significantly diminished.

When Claimant returned to Dr. Jones on 26 Feb 04, he reported minimal benefit from the last injection, and that while Claimant could tolerate his symptoms as long as he remained inactive, any type of exertion causes pain and limits his activity. He said the right side was worse than his left. Claimant had positive left and right straight leg raise tests. Dr. Jones assessed Claimant as suffering from a left paracentral disc herniation at L4-5, bilateral lumbar radiculopathy, and epidural fibrosis. Since the herniation was at the same level Dr. Angel addressed

surgically, Dr. Jones believed it was related to Claimant's original work accident. Since Claimant had new complaints of left sided pain and the injections did not work, he sent Claimant back to Dr. Angel for surgical evaluation.

Claimant did not return to Dr. Jones until 27 Oct 05. He reported his condition was largely the same. He also reported that his right side was generally more symptomatic than his left, but his left side could be worse at times. Dr. Jones diagnosed Claimant with chronic low back pain, bilateral lumbar radiculopathy, recurrent L4-5 disc herniation, and epidural fibrosis with scarring at the right S1 nerve root.

Claimant related that Dr. Angel had wanted a lumbar myelogram, but Carrier refused to approve it or further surgery. However, Claimant's records from Dr. Angel show that Claimant had a myelogram and CT scan on 19 Aug 03. The myelogram showed left side disc protrusion at L3-4, but only narrowing at L4-5 (and not a herniation as reported in the January 2004 MRI). The CT scan showed a left side posterior disc protrusion at L3-4 and a left side posterior disc protrusion or scar tissue at L4-5, with decreased contrast filling at the L4-5 left nerve root. Based on that myleogram, Dr. Angel determined that a second surgery was not necessary. A myelogram is a painful procedure and it is not likely that someone would forget having one.

At that time, Dr. Jones did not believe Claimant could return to his original work based on Claimant's description of the job and his subjective reports that even minimal activity caused pain. That did not mean Claimant could not work. However, it is difficult to determine what work he could do, based solely on his subjective reports of pain.

Claimant saw Dr. Jones again on 15 Dec 05, reporting continued low back pain with bilateral radiculopathy into his legs. Claimant reported that walking helps his pain, as long as it is not excessive. He also stated the left side pain is much less severe than on the right. Dr. Jones continued to diagnose Claimant with chronic low back pain, bilateral lumbar radiculopathy, recurrent L4-5 disc herniation, and epidural fibrosis with scarring at the right S1 nerve root.

Claimant returned on 4 Apr 06, but did not report left side pain. Claimant continued to report that Dr. Angel's request for myelogram and surgery was denied by Carrier.

An L3-4 disc bulge or protrusion could be the source of the symptoms Claimant reported on 27 Oct 05. However, a bulge can also be a normal finding in patients since 30% of all people have a bulging disc. A disc progressing to a protrusion can be a part of the aging process or a result of trauma. Dr. Jones does not believe

that the original work injury caused the L3-4 protrusion, assuming the radiologist reports are consistent in their definitions of a bulge and a protrusion. If not, the bulge may have been a result of the accident, but remained asymptomatic at the time.

It is possible that the L4-5 protrusion or scar tissue is the source of Claimant's left side complaints. It is also possible, but unlikely, that the injections caused that pain.

There is some disagreement in the medical community, but Dr. Jones does not think that taking opiate pain relievers excludes a patient from working altogether. Claimant cannot return to his original job, but could work in some gainful capacity. An FCE and full evaluation would be necessary to define what work Claimant could do. Although FCEs are good tools, one needs to account for the degree of effort expended on the test and the pain suffered afterward as a consequence of that effort. Claimant should probably not try to lift more than 10 to 25 pounds in any job. Dr. Jones' opinion of Claimant's employability is based on Claimant's subjective reports of how activity causes pain. While Claimant seemed to understand some of what Dr. Jones would say in English, he always waited for the interpreter and always replied in Spanish. Claimant's complaints were consistent with ongoing nerve root irritation and although they improved with surgery, they still continued. Dr. Jones never sensed that Claimant magnified or exaggerated his symptoms.

Dr. Larry Likover testified by deposition and his records show in pertinent part that:[54]

He sees a weekly average of 2 to 4 patients on behalf of parties in litigation. The vast majority are sent by employers or carriers. He takes five minutes to do the examination and another five to ten minutes to do the report. He was retained by Employer to evaluate Claimant. He reviewed Claimant's records, MRI, and FCE before seeing him on 20 May 04. Claimant gave a history of right leg and hip pain. He related no complaints about his left side. Claimant had no pain with a sitting straight leg test and only right leg pain with a reclined straight leg test.

His impression was that Claimant suffered a herniated L4-5 disc in a fall. He noted that Claimant underwent a right side microlaminectomy, which was an appropriate treatment and achieved excellent objective results. Claimant has no focal findings indicating a pinched nerve in his back. Claimant had an abnormality on the left side, but it did not affect the nerve to the left leg.

[54] EX-6; EX-7.

Dr. Likover's impression was affirmed by his review of Dr. Angel's 17 Mar 04 and 1 Sep 04 notes and the subsequent myelogram and CT scan. Neither the CT scan nor the myelogram indicated major nerve root impingement or any other objective source of pain. There is minor nerve root impingement that is clinically insignificant.

Claimant does not need any significant medical intervention or narcotics. Claimant can return to unrestricted work on a day in and day out basis. He can occasionally lift up to 100 pounds, although he may have some backaches. Dr. Likover opined that Claimant should be on an exercise program and taking over the counter medications, as required. Claimant's reported left leg pain is mechanical or nonstructural back pain. Claimant's pain is not verified by examination and may include a psychological component.

He has reviewed surveillance video of Claimant taking part in various physical activities. That video confirms his impression.

Dr. Angel's diagnosis of chronic back pain is based on Claimant's subjective complaints, but Claimant also has a financial disincentive to report that his back is fine. Nevertheless, there are patients who do suffer chronic back pain who have no financial incentive to do so.

Nancy Favaloro testified by deposition and her records show in pertinent part that:[55]

She is a vocational rehabilitation counselor. She met with Claimant on 29 Apr 04 and conducted an interview about his background and abilities. Although he primarily speaks Spanish, he took his drivers license test in English and passed. He is bored and would like to work. He walks between 1 ½ to 2 miles everyday and stretches. He does yard work for 10 or 20 minutes at a time, goes to the grocery store, and runs errands for his family. He tries to help around the house. He did not mention having any trouble driving.

He was diagnosed with a lumbar strain and underwent work hardening. His FCE limited him to medium work with a 50 pound lifting limit. She and her staff looked at entry level sedentary and light demand jobs for Claimant. They contacted a number of potential employers and found the following possible jobs in May 2004.

[55] EX-8; EX-16.

Business	Location	Job Description	Physical requirements	Pay/Hr
Guadalajara Restaurant	Port Arthur	Bussing tables	Primarily standing with some breaks; 20 pound lift limit or less with more trips	$ 5.15
JB Packing	Port Arthur	Production line seafood picker /sorter	Primarily standing with some breaks; 20 pound lift limit	$5.50
Helena Laboratories	Beaumont	Silk screen press operator	Primarily standing; 30 pound lift limit	$7.49
Helena Laboratories	Beaumont	Packager	Primarily sitting; 20 pound lift limit	$7.49
Munro's Cleaners	Beaumont	Garment inspector	Primarily standing with some breaks; 10 pound lift limit	$6.00
Munro's Cleaners	Beaumont	Presser	Primarily standing with some sitting and walking; 20 pound lift limit and no bending stooping, or squatting	$7.00
Munro's Cleaners	Beaumont	Garment tagger	Sedentary	$6.00

All of the positions allowed for on the job training, were well within Claimant's technical abilities and accommodated Spanish as the primary language. They are full time jobs, at which regular attendance would be expected. They were submitted to and approved for Claimant by Dr. Angel, who also agreed that Claimant could perform similar jobs. While all of the businesses indicated they had regular openings for their positions and were accepting applications only the presser position was actually available the day the employer was contacted.

William Kramberg testified by deposition and his records show in pertinent part that:[56]

He is a rehabilitation counselor and interviewed Claimant at the request of Claimant's attorney on 3 Mar 05. Claimant described his daily activities and said he did not do much housework, cooking or laundry, but tried to do yard work at

[56] CX-19; CX-20; CX-26.

his own pace, which could result in pain problems the next day. The surveillance videos that Mr. Kramberg saw showed Claimant walking, stretching, and doing yard and handyman work. Claimant has a very limited education and cannot read or write in English.

Mr. Kramberg reviewed the jobs recommended by Ms. Favaloro and contacted all of the employers, except for the Guadalajara Restaurant, which had its phone disconnected with no new listing. He does not believe any of the jobs are suitable for Claimant. He did not look for any other possible jobs for Claimant.

He was told the seafood picker job involves a lot of bending, is fast paced, and the floors are slick and slippery. It could decrease to 25 to 30 hours per week during the slow season. The Helena Production employer informed Mr. Kramberg that they prefer to hire individuals with at least a GED, it takes longer to train someone who does not speak English, and the screening job involves lots of bending, stooping, and reaching. They indicated the packaging job also involves a lot of bending. Munro Cleaners indicated they had openings only for experienced pressers and that a doctor would examine applicants for any job before they would be allowed to start work. They indicated the inspector job allowed sitting only while on break and there were no inspector positions currently open. All of the employers indicated that repeated absenteeism would be a problem.

Based on Claimant's age and education, Mr. Kramberg does not think Claimant is likely to be able to return to any employment. However, each possible job would have to be evaluated on its own as to whether it would be appropriate for Claimant. Claimant's age and lack of education, along with his pain and physical limitations, work to take him out of any vocational probability for gainful employment.

Department of Labor forms show in pertinent part that:[57]

From 13 Oct 02 to 3 Jul 04, Employer paid Claimant temporary total disability benefits based on an AWW of $792.75.

An informal conference was scheduled for 17 May 04. An informal conference was held on or about 22 Jul 04.

On 30 Jun 04, Employer completed a notice of final payment based on Claimant's ability to return to work at light duty.

Employer filed a formal notice of controversion in May 2005.

[57] CX-1.

ANALYSIS

Extent of Disability

The area of significant dispute upon which the parties focused relates to the nature and extent of Claimant's injury. Claimant argues that he has never been able to return to his original job as a welder, that Employer has failed to show any suitable alternative employment (SAE), and that on 1 Sep 04 his status changed from temporary to permanent. Employer concurs with the 1 Sep 04 status change, but argues that as of 10 Jun 03, Claimant was able to return to heavy labor as a welder and if not as a welder, to the SAE that Employer established existed.

Claimant's Ability to Return to His Original Job

Claimant testified that his usual employment as a welder required him to carry up to one hundred pounds of equipment and weld while upside down and inclined, sometimes having to bend for two or three hours. He stated that he cannot lift more than 30-40 pounds or stand, sit or bend for extended periods. He denied being able to return to welding.

Neither of Claimant's primary treating physicians cleared Claimant to return to welding. Dr. Angel observed that he did not find objective evidence to explain Claimant's pain, and did not have any reason to question Claimant's FCE report. Nonetheless, Dr. Angel hesitated to recommend that Claimant return to any type of work while taking narcotic pain medication. However, he did defer to the vocational medicine experts to give an opinion on any specific job.

Similarly, based on Claimant's reports of pain with significant physical activities and his description of his welding job, Dr. Jones does not believe Claimant can return to that type of work. He feels that Claimant should be restricted to lifting no more than 10-25 pounds. Dr. Jones found that Claimant's complaints remained consistent and he never believed Claimant was exaggerating or malingering.

On the other hand, Dr. Likover believes Claimant can return to unrestricted welding on a daily basis and occasionally lift up to 100 pounds. He is unable to verify Claimant's reports of pain through his review of the objective data. He believes the surveillance video supports a conclusion that Claimant's pain has a psychological component and that Claimant has financial motives for remaining off work.

The fundamental basis for the split medical opinion appears to be the weight the doctors give Claimant's subjective complaints. Although Claimant testified through an interpreter and there may have been some inconsistencies in his deposition description of his capacity for yard work and the surveillance video, I note that Claimant appeared generally credible. Of more importance is the basis the doctors had for deciding how heavily to weigh Claimant's subjective complaints. Both Dr. Angel and Dr. Jones were treating physicians who saw Claimant on multiple occasions over an extended period of time. Dr. Likover, on the other hand, candidly admitted that in evaluating employees for employers, he regularly spends five minutes in examining the employee and five to ten minutes writing his report.

Because of the length and depth of their involvement with Claimant's case, I find the opinions of the treating physicians to be worthy of much more weight than that of Dr. Likover. Their opinions, along with Claimant's testimony, are sufficient to establish that Claimant cannot return to his original welding job and is presumed totally disabled in the absence of suitable alternative employment.

Claimant's Capacity to Work and Suitable Alternative Employment

With the finding that Claimant is presumptively total disabled, the burden rests on Employer to establish SAE. Employer offered no significant evidence as to any SAE before May 2004 and Claimant is therefore deemed temporarily total disabled from 13 Oct 02 to 30 Apr 04.

As to entitlement to benefits beyond 30 Apr 04, the threshold issue is a determination of Claimant's physical limitations. Claimant testified that he can sit for an hour before he has to stand up; he can last longer standing up; he can walk up to two hours; changing from sitting to standing or standing to sitting makes his back feel a lot better; he can drive, but has to stop every 45 to 75 minutes; the heaviest thing he can carry would be fifteen to thirty pounds; he can move up to 60 pounds; and he can only lift 10-15 pounds pain free.

Dr. Angel opined that he had no reason to disagree with the FCE and that, but for taking pain medications, Claimant could work. Dr. Angel was equivocal as to the degree that pain medications limit Claimant's employment and deferred to vocational medical experts on that issue. Dr. Jones does not believe that taking opiate pain relievers excludes Claimant from all employment. He feels that Claimant can work in some gainful capacity, but should be restricted to lifting no more than 10-25 pounds. The surveillance video shows Claimant working the back seat of his truck and doing medium yard work, with breaks, for an extended period. The video demonstrates that Claimant is capable of some physical activity.

The evidence shows that Claimant's physical limitations would allow employment which accommodated his need to occasionally shift from sitting to standing, minimized bending and twisting, and limited weight lifting. There is little dispute that Claimant is unable to communicate extensively in English and has a very limited education background.

Employer's vocational expert interviewed Claimant and reviewed his case. She assumed a 50 pound lifting limit and considered sedentary and light demand jobs. She identified six jobs and contacted the employers. She reported that all were fulltime jobs, allowed for on-the-job training, were well within Claimant's technical abilities, and accommodated Spanish as the primary language. The jobs were reviewed and approved for Claimant by Dr. Angel, who also indicated Claimant could perform similar jobs. She reported that all of the employers indicated they had regular openings for the positions and were accepting applications, but only one job (the presser position) was actually available the day the employer was contacted.

In response, (almost one year later) Claimant's vocational expert attempted to contact the employers in each of the positions identified by Employer's expert. He reported a number of problems with the jobs listed by Employer's expert. One employer (the restaurant bussing position) no longer had a telephone. The seafood picker job is seasonal (down to 25-30 hours per week during the slow season), involves a lot of bending, is fast paced, and the floors are slick and slippery. Helena Lab prefers to hire individuals with at least a GED and takes longer to train someone who does not speak English. Their screening job involves lots of bending, stooping and reaching and their packaging job involves a lot of bending. Munro Cleaners indicated they only had openings for experienced pressers and that a doctor would examine applicants for any job before they would be allowed to start work. They indicated the inspector job only allowed sitting while on break and there were no inspector positions currently open. All of the employers indicated that repeated absenteeism would be a problem.

Claimant's vocational expert did not attempt to find any other jobs because he clearly felt that Claimant was virtually unemployable because of his age, physical limitations, lack of skills and education, and probable absence problems. Employer's expert apparently interpreted ambiguities and unknowns in favor of employability. For instance, he assumed that a job which required primarily standing on a production line with some breaks would adequately accommodate Claimant's limitations. On the other hand, Claimant's expert appeared to have done the opposite. For instance, he assumes that an employer who preferred a GED holder would not hire Claimant or be willing to spend the extra time training in Spanish or that Claimant simply can not sustain attendance at a full time job.

Claimant testified that he did not apply at the restaurant because the job was already taken, and while he applied at the seafood plant, he did not get the job. He states he did not apply for jobs at Munro Cleaners or Helena Laboratories.

Ultimately, however, the question is whether Employer carried its burden and established that (1) there are jobs Claimant is reasonably capable of doing or being trained to do considering his age and background; (2) those jobs are reasonably available; and (3) he could reasonably compete for and likely could secure them.

The restaurant job was not available when Claimant asked and he applied, but was not hired at the seafood plant. The Helena Laboratories employer indicated they preferred to hire GED holders and not have to train non-English speakers. While those problems may have been ultimately overcome by Claimant, they are such that they call into serious question whether Claimant could reasonably compete for and likely could secure a job with Helena. Similarly, Munro Cleaners noted they had openings only for experienced pressers, which makes the presser job not reasonably available. They indicated the inspector job allowed sitting only while on break and there were no inspector positions currently open. That leaves the garment tagger position, which was not discussed at length, and was not mentioned in Employer's expert's report, but was characterized in the notes of a worksheet as sedentary. However, Munro Cleaners also indicated that a doctor would examine applicants for any job before they would be allowed to start work.

I find that the record establishes that Claimant would physically be able to engage in employment that would allow him to periodically change from seated to standing and not require frequent twisting, bending, or regularly lifting more than 30 pounds. However, I do not find that the evidence offered by Employer or the record as a whole establishes that Employer has identified jobs that Claimant is reasonably capable of doing and for which he could reasonably compete and likely secure.[58]

Accordingly, I find Employer has not established SAE. Consistent with the parties' stipulation as to MMI, I find Claimant temporarily totally disabled from 13 Oct 02 to 31 Aug 04 and permanently totally disabled from 1 Sep 04, to present and continuing.

Penalties

Timely controversion was not briefed by either side. Claimant simply listed it as an issue and asserted that there was no timely controversion. Employer noted it was an issue, but made no other mention of it. The earliest document in the record that appears

[58] There was some mention in the record that Employer offered a position answering the phone, but given Claimant's very limited ability to speak English, I did not consider that reasonable alternative employment.

to include a statement that the right to compensation was controverted, the names of the claimant and employer, the date of the alleged injury, and a grounds for controversion is the 30 Jun 04 notice of termination of payments.

Consequently, I find that Employer satisfied the requirement for controversion as of 30 Jun 04.

ORDER AND DECISION

1. Claimant injured his back in the course and scope of his employment under the Act on 12 Oct 02.

2. Claimant reached maximum medical improvement on 1 Sep 04.

3. Claimant's average weekly wage at the time of that injury was $837.75.

4. Claimant has been and continues to be totally disabled from 13 Oct 02.

5. Employer shall pay Claimant temporary total disability compensation from 13 Oct 02 through 31 Aug 04, based on an average weekly wage of $837.75.

6. Employer shall pay Claimant permanent total disability compensation from 1 Sep 04, to present and continuing, based on an average weekly wage of $837.75.

7. Employer first controverted the claim on 30 Jun 04. Employer shall pay penalties on the above amounts in accordance with Section 14(e) until that date.

8. Employer shall pay all reasonable, appropriate, and necessary future medical expenses arising from Claimant's 12 Oct 02, excluding any chiropractic care.

9. Employer shall receive credit for all compensation heretofore paid, as and when paid.

10. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982).[59]

12. The district director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.

[59] Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *Grant v. Portland Stevedoring Co., et al.*, 16 BRBS 267 (1984).

13. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[60] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. In the event Employer elects to file any objections to said application it must serve a copy on Claimant's counsel, who shall then have fifteen days from service to file an answer thereto.

So ORDERED.

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PATRICK M. ROSENOW
Administrative Law Judge

[60] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 813 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **20 Oct 04**, the date this matter was referred from the District Director.